SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 731

WAGS TRANSPORTATION SYSTEM, INC., a corporation; MORRIS LANSBURGH, and THERESA SCHAUER,

Petitioners,

v.

PRESTON G. PRIVATT, as Ancillary Administrator of the Estate of EDITH L. TREES, Deceased; GILDA DAHLBERG, a widow; POLLY LUX, a freedealer; TEDLAND REALTY CORPORATION, a Florida corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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This brief is filed by the Respondents in this cause, in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Florida, filed by the Petitioners herein. This brief is filed under the provisions of Supreme Court Rule No. 24 for the purpose of disclosing to the Court matters or grounds why the cause should not be reviewed by the Supreme Court of the United States.

Respondents reserve their right to file an additional brief on the merits under Supreme Court Rule No. 41, if certiorari is granted by the Court.

JURISDICTION

Petitioners' jurisdictional statement in the Petition (Petition, Page 2) shows on its face that the time for filing such a petition had already expired prior to December 5, 1957, when petitioners filed their Application for Extension of Time in the Supreme Court of the United States. This matter will be more fully argued hereinafter.

Respondents also wish to supplement petitioners' jurisdictional statement by bringing to the Court's attention the letter of The Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, which is shown at Page 71 of the Petition, but which bears no separate appendix designation. This letter states that petitioners' "Petition to Recall Mandate" was filed contrary to the rules of the Supreme Court of Florida and was, therefore, returned to the petitioners by the Chief Justice of that Court. The Petition for Certiorari later shows that the Federal question here presented was raised only in said "Petition to Recall Mandate" (Petition, Page 9). Thus the Federal question was never properly raised in the State court since the only document in which it was raised was filed contrary to the rules of the State Court.

QUESTION PRESENTED (by Petitioners)

In the present brief, respondents do not propose to argue the merits of the question presented by petitioners

except insofar as the question shows on its face why this cause should not be reviewed by the Supreme Court of the United States.

The question presented shows on its face that it should not be reviewed by the Supreme Court of the United States because the question reveals that the Supreme Court of Florida did not decide a Federal question as defined in Rule 19 of the United States Supreme Court Rules. Instead, the Petition reveals that the so-called "Federal question" was first raised by petitioners in their "Petition to Recall Mandate", and that said "Petition to Recall Mandate" was not accepted by the Supreme Court of Florida because it was filed contrary to the rules of that court. (See letter of Mr. Chief Justice Terrell, shown at Page 71 of the Petition for Certiorari.)

In addition, the Petition for Certiorari itself reveals that the decision of the Supreme Court of Florida, as expressed in its opinion (97 So. 2d 473), was based entirely on non-Federal grounds.

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains much that is irrelevant here and also includes several statements that may be misleading to the Court.

First of all, the actual amount of land involved in the present proceeding is six lots, each one hundred feet wide. The trial court decreed that the Miami Beach Zoning Ordinance (Ordinance No. 289) was void and of no effect as it attempts to limit the use of such six hundred feet of property to single-family estate purposes, and

enjoined the City of Miami Beach from enforcing that ordinance insofar as it so limits the use of respondents' property. It also decreed that the respondents are entitled to use their said six hundred feet of land in such a manner as will permit the construction thereon of apartments or hotels.

The City of Miami Beach appealed this decree to the Supreme Court of Florida and the present petitioners were permitted to intervene in that appeal, although they had taken no part in the proceedings in the trial court. The City and the intervenors then jointly filed a brief on the merits in the Supreme Court of Florida.

At the time of oral argument, the City of Miami Beach filed a statement advising the Court that the City had passed an amendatory ordinance, which ordinance rezoned the strip of land approximately one and one-half miles long, which included the six hundred feet owned by the respondents, and which ordinance would permit the use of the whole strip including respondents' six hundred feet of land for apartment and hotel uses. (See opinion of the Supreme Court of Florida; Petition, Pp. 45-46.)

The intervenors (petitioners here) had full opportunity to present their arguments orally to the Supreme Court of Florida and, in fact, they did so.

The Supreme Court of Florida then entered its judgment and opinion on July 24, 1957, affirming the trial court. This judgment by no means rested solely on the passage of the amendatory ordinance but rather the opinion rests on the whole record of the cases and covers

the various points raised by the intervenors, such as res judicata, stare decisis and estoppel by judgment.

The intervenors (petitioners here) then filed a Petition for Rehearing in which they completely ignored the other grounds for the decision of the Supreme Court of Florida and merely advised the Court that the amendatory ordinance had been repealed by referendum. (Petition, Appendix "D", Pp. 53-59).

The Supreme Court of Florida, in its original opinion, had stated:

> "The record reveals no basis on which we would be authorized to upset the decree nor anything that would be accomplished by doing so."

On September 18, 1957, The Supreme Court of Florida added to its original opinion the following: (Petition, Appendix "E", Pp. 61-62)

> "Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree."

The Supreme Court of Florida then denied the Petition for Rehearing.

Thus, at this point of the proceedings, no Federal question had been raised, and the Supreme Court of Florida had decided the case solely on local issues—the evidence itself, and local law pertaining to zoning, estoppel by judgment, res judicata and stare decisis.

Moreover, Rule 3.14 (e) of the Florida Appellate Rules provides:

> "e. Only One Petition Allowed. The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court."

The petitioners themselves recognize this rule, for in their subsequent Petition to Recall Mandate (Petition, Appendix "F", P. 68), they say, inter alia: " * * * these appellants no longer had any right to add to the record by another petition for rehearing under Rule 3.14 (e) of the Florida Appellate Rules * * * ".

Nevertheless, the petitioners then proceeded to file their so-called "Petition to Recall Mandate," which prayed the Court to "re-set the cause upon rehearing for oral argument or, in the alternative, permit these appellants to file petition for rehearing to the amended opinion and judgment, within a time to be specified." (Petition, Appendix "F", Pp. 69-70).

Thus the Petition to Recall Mandate itself admitted that it was filed in violation of the rules of the Florida Supreme Court.

The Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, then returned the Petition to Recall Mandate to the petitioners, saying: (Petition, Appendix "F", P. 71)

> "I have examined your petition to recall mandate in City of Miami Beach v. Prevatt et al. I have also submitted it to the court who adjudicated this case and they are of the view that it amounts to a petition for rehearing, the second which has been filed in the cause contrary to the rules, and should be returned to you."

HOW FEDERAL QUESTION WAS PRESENTED

On Page 9 of their Petition for Certiorari, the petitioners allege that the Federal question was raised in these proceedings solely in the so-called Petition to Recall Mandate which admittedly was submitted in violation of the rules of the Florida Supreme Court, and which was returned to the petitioners by that Court because it was contrary to those rules.

To justify this unique procedure, petitioners cite the case of **Chapman v. St. Stephens Protestant Episcopal Church, Inc., et al., 105 Fla. 683, 138 So. 630.** This case by no means requires the Supreme Court of Florida to grant a second petition for rehearing and, in fact, that case was decided in 1932 long before the present Florida Appellate Rules were adopted and long before the Supreme Court specifically adopted a rule forbidding the filing of a second petition for rehearing. The petitioners also cite the case of **Saunders v. Shaw, 244 U.S. 317, 37 Sup. Ct. Rep. 638, 61 L. Ed. 1163.** In that case, the plaintiff in error

had never been permitted to present his evidence at all in the trial court. In the present case, the present petitioners made no attempt to intervene in the case until after final decree in the trial court and they intervened only for the purpose of appeal and have never attempted to add to the trial record in these cases. In the Saunders case, the Federal question arose, not because the State Court had refused to permit a second petition for rehearing, but because that Court had decided the case without permitting the plaintiff in error to introduce his evidence in the trial court. In the present case, the petitioners have never attempted to introduce evidence in the trial court; they intervened, after final decree, solely for the purpose of appeal. In the appeal, they have exercised every right to which an appellant is entitled under the Florida practice—the right to file a brief, the right to oral argument, and the right to file one petition for rehearing.

Thus it is apparent that the Supreme Court of Florida did not decide a Federal question, that it decided the case solely on non-Federal grounds, that the so-called Federal question was raised only in a Petition to Recall Mandate which was itself contrary to the rules of the Florida Supreme Court, and that the Florida Supreme Court did not deprive the present petitioners of any right or due process of law.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

As intimated in the foregoing portions of this brief, there are numerous reasons why this cause should not be reviewed by the Supreme Court of the United States, which may be summarized as follows:

1. The time for filing a Petition for Certiorari in this Court had already expired prior to December 5, 1957, when petitioners filed their Application for Extension of Time in this Court. (Judgment of Florida Supreme Court was entered on July 24, 1957).

2. The Federal question was never properly raised in the Florida court since such a question was first raised in the Petition for Recall of Mandate, which was submitted contrary to the rules of the Florida Supreme Court.

3. All decisions by the Florida courts in the case at bar—including the trial court's decree, the Supreme Court's judgment and opinion, the Supreme Court's ruling on the Petition for Rehearing and the Supreme Court's ruling on the Petition to Recall Mandate—were decided solely on the basis of local law and local rules.

4. The question presented by petitioners and their statement of reasons for granting a writ of certiorari reveal that their sole grounds for invoking the Fourteenth Amendment to the Federal Constitution is that the Florida Supreme Court did not grant them a rehearing. Under Florida law, a rehearing is not a matter of right, but rests in the sound judicial discretion of the Court.

5. The Petition for Certiorari reveals on its face that there are no "special and important reasons" for granting it, as required by Rule 19 of this Court.

ARGUMENT

1. The time for filing a Petition for Certiorari in the Supreme Court of the United States had already expired prior to December 5, 1957, when petitioners filed their Application for Extension of Time in this Court.

The Petition for Certiorari (Page 2) states that the **judgment** of the Florida Supreme Court was entered on July 24, 1957.

Rule 34 (2) of this Court states:

> "Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such extension shall be timely if it is presented to the clerk **within the period sought to be extended.** The clerk will refuse to receive any application for extension sought to be presented after expiration of such period." (Emphasis added)

Title 28, Section 2101 (c), U.S.C., provides:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for **within ninety days after the entry of such judgment or decree.** A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for

a period of not exceeding sixty days." (Emphasis added)

Petitioners, in their petition (Page 2), concede that "The **judgment** of the Florida Supreme Court in its original form **was entered on July 24, 1957.**"

The ninety-day period beginning on July 24, 1957, expired on October 22, 1957, while the petitioners did not apply for any extension of time in this Court until December 5, 1957. However, this Court has held that the running of the ninety-day period is suspended during the time that a timely petition for rehearing is pending. **Gypsy Oil Co. v. Escoe, 48 S.Ct. 112, 275 U. S. 498, 72 L. Ed. 393.**

Here, the petition for certiorari states that the petition for rehearing was filed on August 21, 1957, and was denied on September 18, 1957—a period of twenty-eight days. Assuming that the ninety-day period began running on July 24, 1957, but was suspended during the twenty-eight day period the petition for rehearing was pending, the ninety-day period then expired on November 20, 1957.

Under either interpretation of the rule, the petitioners' Application for Extension of Time, filed in this Court on December 5, 1957, was filed too late, and this Court no longer had jurisdiction of the cause.

The second petition for rehearing (styled "Petition to Recall Mandate") does not, of course, suspend the time for applying for certiorari, under the doctrine of Gypsy Oil Co. v. Escoe, supra.

2. The Federal question was never properly raised in the Florida court since such a question was first raised in the Petition for Recall of Mandate which was submitted contrary to the rules of the Florida Supreme Court.

Petitioners concede that the so-called "Federal question" was first raised by them in their "Petition to Recall Mandate" (Petition, Page 9). This Petition to Recall Mandate was, in fact, a second petition for rehearing since its prayer is a prayer for rehearing. (Petition, Appendix "F", Pp. 69-70).

Filing of the Petition to Recall Mandate was refused by the Chief Justice of the Supreme Court of Florida on the ground that it was contrary to the rules of that Court. (Petition, Appendix "F", Page 71).

Section 3.14 (e) of the Florida Appellate Rules, relating to rehearings, states:

> "(e) **Only One Petition Allowed.** The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court."

The general rule is that a claim of Federal question first made in an application for leave to file a second petition for rehearing comes too late. **Bilby v. Stewart, Okl. 1918, 38 S.Ct. 264, 246 U. S. 255, 62 L. Ed. 701; Rooker v. Fidelity Trust Co., Ind. 1923, 43 S.Ct. 288, 261 U. S. 114, 67 L. Ed. 556; Wall v. Chesapeake, etc., R. Co., 1921, 41 S.Ct. 402, 256 U. S. 125, 65 L. Ed. 856. See also, McMillen**

v. Ferrum Min. Co., Colo. 1905, 25 S.Ct. 533, 197 U. S. 343, 49 L. Ed. 784.

The Florida Supreme Court, of course, never considered or passed upon any Federal question inasmuch as the Federal question was first raised in the Petition to Recall Mandate, which the Florida court refused to consider because it was filed contrary to its rules. **See Scott v. Platt, 1943, 137 P. 2nd, 975, 171 Or. 379.**

Petitioners attempt to evade the operation of this general rule by relying on the "surprise" doctrine of Saunders v. Shaw, 37 S.Ct. 638, 244 U. S. 317, 61 L. Ed. 1163.

An examination of Saunders v. Shaw (supra) reveals that it is totally inapplicable to the case at bar. In Saunders v. Shaw, the trial court held for defendant, without hearing defendant's evidence on all points. The Supreme Court of Louisiana first affirmed this judgment; then, on rehearing, it granted an injunction against the defendant. Defendant petitioned for rehearing but the Louisiana court refused because there had already been one rehearing (at the instance of the plaintiff). The Supreme Court of the United States then accepted jurisdiction of the case on defendant's writ of error, solely on the ground that defendant had been deprived of due process because defendant had never had an opportunity to put on all its evidence.

The case at bar presents a far different situation as is revealed by a summary of the progress of the case:

a. Petitioners were not parties to the case in the trial court and made no attempt to introduce evidence there.

b. Petitioners were allowed to intervene in the case solely for the purpose of taking an appeal "in subordination to and in recognition of the main proceeding." **Wags Transportation Co. v. City of Miami Beach, Fla. 1956, 88 So. 2d 751.**

c. On appeal, petitioners were allowed to file a brief and to argue the case orally.

d. The Supreme Court of Florida then entered its judgment of affirmance on July 24, 1957. In its opinion, it passed on the points raised by petitioners (then intervenor-appellants) such as res judicata, stare decisis, estoppel by judgment, and the evidence shown in the record as a whole, saying, inter alia, "The record reveals no basis on which we would be authorized to upset the decree nor anything that would be accomplished by doing so." The Court also discussed the amendatory ordinance, but its decision by no means rested on that ground. (See opinion, Petition, Appendix "C", Pp. 37-49).

e. Petitioners were then allowed to file a petition for rehearing, and did so. (Petition, Appendix "D", Pp. 53-59). This petition for rehearing raised two grounds, both of which argue the invalidity of the amendatory ordinance which was not a part of the trial record and which was not the basis of the Florida Supreme Court's decision.

f. The Supreme Court of Florida denied the petition for rehearing and in its order it emphasized that

the case had been decided on the whole record, saying (Petition, Appendix "E", Pp. 61-62):

> "Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree."

g. Petitioners had then received every possible benefit of due process of law under Florida practice and, in fact, they had been specially favored in view of the fact that they had made no attempt to intervene in the case until after entry of the final decree. Despite this fact, however, the petitioners now filed a "Petition to Recall Mandate", which again prayed for a rehearing, contrary to the Florida Appellate Rules, and their petition was denied for that reason.

In view of this state of the proceedings, it is difficult to see the applicability of the Saunders v. Shaw doctrine. The case at bar had been decided on the evidence and the record, each time contrary to petitioners' contentions, on three separate occasions—by the trial court, by the Supreme Court on July 24, 1957, and again by the Supreme Court on September 18, 1957. The petitioners, however, made no effort or attempt to raise a Federal question until their "Petition to Recall Mandate" in October, 1957.

In an attempt to justify this procedure, petitioners now plead "surprise" and say they have been deprived of an opportunity to add to the record, to bring themselves within the doctrine of Saunders v. Shaw. The difference between the two cases is startling: In Saunders v. Shaw, "adding to the record" meant to introduce evidence in the trial court; in the case at bar, "adding to the record" means merely filing another petition for rehearing. (See Petition, Appendix "F", Page 68).

The Petitioners have certainly stretched to the breaking point both the Saunders v. Shaw doctrine and the due process clause of the Constitution.

3. All decisions by the Florida courts in the case at bar—including the trial court's decree, the Supreme Court's judgment and opinion, the Supreme Court's ruling on the Petition for Rehearing and the Supreme Court's ruling on the Petition to Recall Mandate—were decided solely on the basis of local law and local rules.

The Florida courts, in the case at bar, have never passed upon a Federal question, as is shown by reading each of the various decisions of the Florida courts:

a. The final decree of the trial court is shown in the Petition, Appendix "B", Pp. 31-36, and it reveals on its face that it was decided solely on the evidence and Florida law;

b. The opinion of the Supreme Court of Florida, July 24, 1957, shown in the Petition, Appendix "C", Pp. 37-49, reveals that no Federal question was under consideration;

c. The order of the Supreme Court of Florida, denying the first Petition for Rehearing, September 18, 1957, is shown in the Petition, Appendix "E", Pp. 61-62, and it, too, is based on local matters only, in particular, the sufficiency of the evidence.

d. The letter of Chief Justice Glenn Terrell, of the Florida Supreme Court, rejecting the Petition to Recall Mandate because it was filed contrary to the rules of that court, is shown in the Petition, Appendix "F", Page 71, and shows that it was based only on the local rules.

In addition, of course, the petitioners themselves say that a Federal question was raised only in their Petition to Recall Mandate, and do not allege that any Federal question was raised before the Florida courts prior to that time.

The actions of the Florida Supreme Court of which the petitioners here complain were not only based solely on local law, but these actions were also purely procedural actions. Thus, petitioners, in their petition in this Court, complain of such procedural matters as consolidation of cases (Petition, Page 13), whether the Florida court can go "outside the record," (Petition, Page 3), how the Florida Supreme Court should conduct oral arguments (Petition, Page 7), the correct procedure to be used in denying a petition for rehearing (Petition, Page 9), and whether the Florida Supreme Court could refuse to consider a second petition for rehearing (Petition, Page 3).

It is, in fact, clear from the petition for certiorari as a whole that nothing is involved in this proceeding at this time except procedural matters. Nothing in the

petition for certiorari would justify a reversal by the Supreme Court of the United States of the actual decision of the Florida Supreme Court to affirm the final decree of the trial court.

The quintessence of the case is the trial court's holding that the Miami Beach zoning ordinance was invalid as to the six hundred feet of property involved, and the Florida Supreme Court's affirmation of this decree on the ground that the decree was justified by the evidence and was without error.

Nothing in the petition for certiorari discloses any error of either of the Florida courts in judging the evidence or in applying the substantive law. All questions raised by the petitioners are procedural matters, in no way affecting the fundamental decisions.

The accepted rule is that decisions of state courts based on local laws not involving constitutional questions are not reviewable in the Supreme Court of the United States. **Hibben v. Smith, Ind. 1903, 24 S.Ct. 88, 191 U. S. 310, 48 L. Ed. 195,** and many other cases. It is also an established principle that judgments of a state court will not be reviewed by this Court if they rest upon adequate state grounds. **Live Oak Water Users Assn. v. Railway Commission, 269 U. S. 354, 359, 46 S.Ct. 149, 70 L. Ed. 305,** and many other cases.

It is also true that the United States Supreme Court will not review a decision of a state court on a matter of state pleading, practice or procedure. **Central Vermont R. Co. v. White, Vt. 1915, 35 S.Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, Tripp v. Santa Rosa St. R. Co., Cal. 1892, 12**

S.Ct. 655, 144 U. S. 126, 36 L. Ed. 372, and many other cases.

In **Southwestern Bell Teleph. Co. v. Oklahoma, Okla.** 1938, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, the Supreme Court of the United States granted a motion to dismiss an appeal from a determination of the Supreme Court of Oklahoma denying a petition for rehearing. The United States Supreme Court, in its opinion, stated that it had no way of knowing whether the petition for rehearing was denied on procedural grounds or on judicial grounds, and dismissed the appeal, saying:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 32 L.Ed. 125, 132, 8 S.Ct. 1053; Johnson v. Risk, 137 U.S. 300, 306, 307, 34 L.Ed. 683, 686, 11 S.Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U.S. 293, 295, 297, 35 L.Ed. 193-195, 11 S.Ct. 528; Whitney v. California, 274 U.S. 357, 360, 361, 71 L.Ed. 1095, 1099, 1100, 47 S.Ct. 641; Lynch v. New York, 293 U.S. 52, 54, 79 L.Ed. 191, 192, 55 S.Ct. 16."

In the case at bar, it was wholly unnecessary to decide a Federal question at any stage of the proceedings, and every decision of the Florida courts, in fact, rested wholly on adequate state grounds.

4. The question presented by petitioners and their statement of reasons for granting a writ of certiorari reveal that their sole grounds for invoking the Fourteenth Amendment to the Federal Constitution is that the Florida Supreme Court did not grant them a rehearing. Under Florida law, a rehearing is not a matter of right but rests in the sound judicial discretion of the court.

To consider this point, it is necessary to analyze the five-part "Question Presented" by the petitioners (Petition, Pp. 3-4) as well as their petition as a whole.

The "Question Presented" states: "Did the Supreme Court of Florida deprive the petitioners and the citizens of Miami Beach of their "Day in Court" in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;" and then lists five particulars which we shall not quote here. The essence of the question is that petitioners contend that they have been deprived of their "Day in Court." Is this true?

First of all, the petitioners were not parties to the suit in the trial court and sought to intervene only after final decree. Therefore, they cannot complain that they had no "Day in Court" in the trial court since they were not necessary parties to the suit and did not seek to intervene until after the final decree had been entered.

Secondly, the petitioners were allowed to intervene for the purpose of taking an appeal. Again, they were not deprived of their "Day in Court" but were actually allowed a "Day in Court" despite their delay in intervening.

Thirdly, the petitioners were allowed to file a brief on the appeal in the Florida Supreme Court. (Petition, Appendix "C", Page 38).

Fourthly, the petitioners were allowed to argue the case orally in the Supreme Court of Florida. (Petition, Appendix "C", Page 46).

Finally, petitioners were allowed to file a Petition for Rehearing in the Supreme Court of Florida. (Petition, Appendix "D", Pp. 53-59).

Thus, petitioners had every "Day in Court" that any litigant can expect or is entitled to under the law and practice of the State of Florida. It is true that their petition for rehearing was denied but this is certainly not uncommon in the Florida Supreme Court or in any other court.

Furthermore, rehearings in the Florida Supreme Court are not a matter of right. In **Trustees of Internal Improvement Fund v. Bailey, 10 Fla. 238, 253,** it is said:

> "Rehearings, therefore, in this Court, are not authorized by statute, nor are they a matter of right, but rest in the sound discretion of the Court."

Thus, a mere denial of a petition for rehearing is not

a deprivation of a "Day in Court", nor does it violate due process of law. Especially is this true in the case at bar where petitioners' Petition for Rehearing attacked the judgment of the Florida Supreme Court on a merely collateral issue and completely failed to point out any error in the actual **ratio decidendi** of the judgment.

5. The Petition for Certiorari reveals on its face that there are no "special and important reasons" for granting it, as required by Rule 19 of this Court.

The applicable portion of Rule 19 of the Rules of this Court is as follows:

"Rule 19. Considerations governing review on certiorari.

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In the case at bar, there is simply no "special and important reason" for review by the Supreme Court of the United States. However, petitioners in the "Reasons

for Granting Writ of Certiorari" set forth in their petition (Pages 10-15) attempt to manufacture such reasons and, in doing so, they tend to mislead the Court in several important respects.

On Page 11 of the Petition for Certiorari, the whole argument of the two complete paragraphs is misleading. The land here involved is not the only remaining ocean-front property in the City of Miami Beach that has been preserved for residential purposes, as petitioners state. In fact, the property here involved is only six hundred feet of oceanfrontage. The remainder of the mile and a half strip of oceanfrontage is not involved in this suit whatsoever. Every statement in the second full paragraph on Page 11 of the petition applies only to the mile and a half strip as a whole and nothing in the record indicates that these statements apply to the six hundred feet here involved. The Final Decree itself (Petition, Appendix "B", Pp. 34-35) specifically indicates that only six lots are involved in this case.

The case of Lansburgh v. City of Miami Beach, mentioned on Page 12 of the Petition for Certiorari, has never entered into the decision or record of the case at bar and is here injected into the case for the first time. The Lansburgh case is presently in the process of appeal in the Florida courts and has no relevance to the case at bar since the subject matter of the Lansburgh case took place long after the final decree was rendered in the case at bar.

The initiative election, mentioned at Page 13 and elsewhere in the Petition for Certiorari took place long after entry of the final decree in this case. In addition,

said election involved the strip of land a mile and a half long and not merely the six hundred feet involved in this case. The results of this election are also under attack in the Florida courts at this time.

The case of City of Miami Beach v. Lachman, mentioned on Pages 13-14 of the Petition for Certiorari is not before the Court at this time. The point the petitioners now raise in relation to that case was disposed of by the Supreme Court of Florida in its opinion on adequate and non-Federal grounds. (See opinion, Petition, Appendix "C", Pages 44 and 48). In any case, petitioners in their first Petition for Rehearing did not even mention the Lachman case. (Petition, Appendix "D", Pp. 53-59).

The Florida Supreme Court, in its opinion of July 24, 1957, said: (Petition, Appendix "C", Page 48)

> "Even if all of the parties were identical, which they are not in these consolidated cases, and even if the action related to the same lands as in the former cases, which it does not, the record reveals changed conditions at the time of the entry of the decree appealed from which would render inoperative and inapplicable the principle of res judicata urged by the appellant."

Not only was this opinion based on purely local facts and local law, but the petitioners did not even question it in their first petition for rehearing. They cannot now urge it as a "special and important reason" for review by the United States Supreme Court.

Thus, all of petitioners' "Reasons for Granting Writ

of Certiorari" evaporate under examination. They cite evidence relating to the effect of rezoning a mile and a half strip of property, but the case at bar concerns only six one-hundred foot lots. They cite the Lansburgh case which is on appeal in the Florida courts and which has never been a part of this record and which also concerns the mile and a half strip. They cite a special municipal election which also concerns the mile and a half strip and which is also under attack in the Florida courts. They disinter the Lachman case which they did not even bother to mention in their first petition for rehearing.

In fact, the case is a simple one involving only the validity of a local zoning ordinance insofar as it affects six one-hundred foot lots in the City of Miami Beach. The trial court, in a straightforward decree, based on factual evidence, found the ordinance invalid as to that six hundred feet. The Supreme Court affirmed the decree on the basis of the evidence and the local law, as they reiterated in their order of September 18, 1957, in which they stated:

> "Moreover, the evidence in this record has been carefully examined by us and we think the conclusion is inescapable that, under the conditions existing as to the lands involved in this litigation at the time the chancellor entered his decree, the conclusion he reached is without error and should be affirmed, regardless of the subsequent enactment of the ordinance after the date of the final decree."

Therefore, petitioners have totally failed to produce "special and important reasons" for review by this Court

as required by Rule 19. It is clear that the State court has not "decided a federal question of substance not theretofore determined by this court," nor has it decided such a question "in a way probably not in accord with applicable decisions of this court." In fact, it is clear that the Florida court has decided no Federal question at all in these cases, nor does such a question exist.

CONCLUSION

For the reasons hereinabove set forth, respondents respectfully request that certiorari be denied.

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